Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253
	)	
	)	
	)	

COMMENTS OF ROBERT LUTZ, et al.

The Law offices of John D. Pellegrin, Chartered, on behalf of Robert Lutz and numerous other parties,[1] each of whom filed applications to provide cellular service in geographically unserved areas, hereby submits Comments in the above-referenced proceeding. Specifically, these parties **oppose** the Commission's proposed shift to competitive bidding ("auctions") as the selection methodology for mutually exclusive unserved area cellular applications which were on file **prior to July 26, 1993.**

I. The Commission's Proposal to Hold Auctions Where Unserved Area Cellular Applications Were on File Before July 26, 1993 is Contrary to the Will of Congress

In order to generate additional revenues for the Federal Government, Congress, In Title VI of the Omnibus Budget Reconciliation Act of 1993 (PL 103-66 August 10, 1993), amended the Communications Act of 1934 to provide for the use of auctions by the FCC for the awarding of certain communications licenses.[2] While cellular services fall within the definition of types of

---

[1] A complete list of all parties to these Comments is attached hereto as exhibit 1.

[2] See 47 U.S.C. § 309(j)

services that would be subject to the new auction provision, Congress specifically included a special rule (codified at 47 U.S.C. § 309 note (e)) allowing the FCC to continue its plans to hold lotteries for mutually exclusive applications which were on file with the agency prior to July 26, 1993. That Rule provides:

> The Federal Communications Commission shall not issue any license or permit pursuant to section 309(i) of the Communications Act of 1934 (47 U.S.C. § 309(i)) after the date of enactment of this Act unless -
>
> (1) the Commission has made the determination required by paragraph (1)(B) of such section (as added by this section);
>
> or
>
> (2) one or more of the applications for such license were accepted for filing by the Commission before July 26, 1993.

In its October 12, 1993 Notice of proposed Rulemaking ("NPRM") instituting this auction proceeding, the Commission erroneously concludes that Congress intended the above-quoted "special provision" to leave the FCC with an "option" regarding the handling of mutually exclusive applications filed prior to July 26, 1993.[3] The FCC views its proposal as a legitimate use of that "discretion" and cites as justification for its decision the statutory objectives of "rapid deployment of new services" and "the opportunity for obtaining a broader diversity amongst the ultimate licensees."

However, from the plain wording of the "special provision" it is apparent that Congress incorporated subsection (2), a specific cut-off date, not to provide the FCC with discretion to use lotteries in some cases because of some vested interest the agency might have in utilizing one method of selection instead of

---

[3] NPRM in PP Docket No. 93-253, released October 12, 1993, at ¶ 160.

another, but rather to prevent unfairness to applicants who had already filed applications in various services in reliance on existing Commission Rules and policies.[4] The cut-off date, close in time to the passage of the Act, stands as notice to future applicants, while protecting those who would have been unfairly caught off guard by the new rules. Thus, to prevent unfairness Congress chose to grandfather existing FCC methods and processing procedures already announced by the Commission for certain applicants.[5]

II. The Use of an Auction Methodology for These Grandfathered, Previously Filed Applications Would be an Improper Retroactive Application of A Commission Rule.

The Supreme Court has noted that "retroactivity is not favored in the law," and that "even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." Bowen v. Georgetown University Hospital, 109 S.Ct. 468, 471-72 (1988). While the Court has acknowledged that retroactive enforcement of an agency rule may be sustained, agencies are required to balance the ill effects of retroactive application against the interests underlying the rule.[6] In

---

[4] If the Commission's interpretation were correct, the cut--off date would have been unnecessary. Congress could have achieved the same result by authorizing the FCC to complete all lotteries it had scheduled, or set forth a phase-in process to allow the Commission to revise its processes.

[5] In full understanding of the purpose of this provision, the FCC has not postponed scheduled IVDS lotteries or proposed retroactively applying auctions to IVDS applicants on file prior to the July 26, 1993 cut-off date.

[6] SEC v. Chenery Corp., 332 US 194, 203 (1947). See also Bowen, 109 S.Ct. at 477-78 (Scalia, J. concurring). (While Justice Scalia, alone in his concurrence, noted that a rule

Yakima Valley Cablevision, Inc. v. FCC, The U.S. Court of Appeals for the District of Columbia Circuit, after reviewing the Commission's balancing of competing considerations, found a rule proposing retroactive effects to be "arbitrary" and "capricious." Therein, the appeals court stated: "When parties rely on an admittedly lawful regulation and plan their actions accordingly, retroactive modifications or recision of the regulation can cause great mischief."[7]

In the past, when balancing the various harms and benefits of retroactive enforcement in a rulemaking context, the Commission has applied a five-factor test.[8] The various factors considered in this balancing of the hardships imposed by retroactive application against any public interest benefits to be achieved by such enforcement include: (1) whether the issue presented is one of first impression; (2) whether the new rule represents an abrupt departure from well established practice; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of burden which

---

having "retroactive effects" or "secondary retroactivity" (i.e., affecting prospectively particular past transactions, rather than changing what was the law in the past) may be sustained if reasonable, he was quick to point out that such a rule may equally be found "arbitrary" or "capricious" under section 706 of the Administrative Procedure Act ("APA") where its retroactive effects impose harsh results on those who reasonably relied on a prior rule.)

[7] Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986).

[8] See Use of Random Selection for Mutually Exclusive Cellular Applications, Report and Order in CC Docket 83-1096, 98 F.C.C.2d 175 (1984). Therein, the FCC analyzed a proposal to give retroactive effect to a new rule under the interest balancing test set forth in Retail Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380 (D.C. Cir. 1972)("Retail Union").

a retroactive rule imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. 466 F.2d at 390.

When the facts of the Commission's instant proposal are analyzed under this test, it is apparent that the proposal to apply auctions retroactively to mutually exclusive applications for unserved cellular areas, which were accepted for filing prior to July 26, 1993, is an improper retroactive application of a Commission Rule.

With respect to the first factor [question of first impression], this is clearly a case of first impression. The FCC has never before been statutorily authorized to award spectrum licenses by auction, and no applicant before the agency has ever been subject to such a selection procedure.

As to the second factor [abrupt departure from well established practice], an FCC decision to adopt an auction based mode of selection for already filed cellular applicants represents a sharp break from a now stable Commission lottery methodology. For over a decade the Commission has struggled to subject cellular applicants to the lottery process. While the use of lotteries initially faced stiff resistance, it has now become a fact of cellular licensing, and was clearly enunciated as the method that would be used to select from among mutually exclusive cellular applicants proposing fill-in service in unserved areas.[9]

---

[9] See Third Report and Order, 7 FCC Rcd. 7183, 7188 (1992); First Report and Order, 6 FCC Rcd 6185, 6170 (1991); Notice of Proposed Rulemaking in CC Docket 90-6, 5 FCC Rcd 1044, 1050 (1990)("We believe that, absent the use of lottery procedures for selecting applications for unserved areas, there will be excessive delays.") Id.

The third factor in the balancing test concerns the level of the affected parties' **reliance** on the existing rule. As noted above, applicants for unserved cellular areas were repeatedly informed that "the winning application among mutually exclusive applications in Phase I will be chosen by lottery." 7 FCC Rcd at 7188. In reliance on such a pronouncement, each applicant was able to make a reasonable business determination regarding the number of applications, the size of markets, and the geographic areas to apply for. Such determinations could be made by evaluating the costs and fees related to the preparation, filing, and prosecution of each application, as well as the expected costs of construction in each market.

The fourth factor is the degree of burden visited upon affected parties by the retroactive application of the Rule. Since the use of auctions in a licensing context would fundamentally alter the business analysis that any applicant would perform prior to applying for unserved area cellular authorizations, retroactive application of an auction selection process would **severely burden** such parties. Given the sizeable expense associated with an auction of valuable spectrum, many applicants would not have filed applications at all had they reasonably anticipated they would have to raise such funds in addition to any subsequent costs of construction. Further, the presence of such a financial consideration would have caused other applicants to file fewer applications or to avoid filings in larger markets where bidding would be high. The unforeseen addition of this factor, well after the fact, may well essentially render many applicants incapable of continuing to prosecute their applications. Thus, many applicants will be

unfairly confronted with a complete loss of their initial investment.

The final factor examines the statutory interest in applying the new rule. First, it is apparent from the plain language of the "special rule" that Congress intended to **grandfather** various applicants accepted for filing prior to July 26, 1993. There is no indication that Congress wished to visit a harsh and unfair burden on these applicants, such as the loss of their investment, or the unexpected addition of the expense of an auction.

The Commission has stated that a shift to auctions would serve the goal of speeding service to the public, especially in rural areas, by weeding out "insincere applicants who do not intend to build out their proposed systems, but rather assign their authorizations for profit." NPRM at ¶ 160. However, the Commission would be hard pressed to show how auctions would deliver service to the public faster than lotteries. The Commission was poised to begin lottery selection for mutually exclusive unserved area cellular applications, when it paused to consider retroactive application of the auction rule. In fact the Commission postponed lotteries scheduled for September 22, 1993 in 18 markets.[10] Thus, had it not been for the instant, last-minute proposal, the Commission already would have made tentative selections of licensees in a number of rural markets. It is further apparent that at the present time, the Commission has adopted no Rules regarding the conduct of auctions. When such rules are adopted, they will naturally be subject to appeal

---

[10] See Lottery Notice, Mimeo No. 34917, released September 16, 1993 (postponing lotteries). See also Lottery Notice, Mimeo No. 33832, released July 9, 1993 (scheduling 18 lotteries).

as well as judicial review. Therefore, it might yet be some time before the Commission is ultimately in a position to begin awarding unserved area cellular licenses through the auction process.

The Commission's present concern with the potential for abuse to its processes by insincere applicants is curious, since such concerns were fully addressed in its First Report and Order. In 1991, as part of the Commission's initial consideration of licensing fill-in cellular service providers, the Commission amended Part 22 of its Rules to require a licensee to complete construction of an authorized system, and notify the Commission of such fact, within one year from the date of grant, or face automatic cancellation of its license.[11] In addition, the Commission amended its Rules to virtually prohibit the assignment of such licenses prior to construction or before the end of the first year of a system's operation.[12] Thus, it is clear that any "would-be speculator" would have filed with the full understanding that it would be required to construct and operate its proposed system for a year before it would be allowed to sell it. At such point the public would already be receiving service, and the identity of the service provider would not be as crucial a concern for the Commission. Naturally, in any subsequent assignment the Commission would review the basic qualifications of the assignee, and as it has previously noted, "competition will ensure that any qualified applicant will

---

[11] 47 C.F.R. § 22.43(c)(2)(ii). See also First Report and Order, 6 FCC Rcd at 6222-24.

[12] 47 C.F.R. § 22.920(c). See also First Report and Order, 6 FCC Rcd at 6222-24.

provide high quality service to the public."[13]

Finally, the Commission's claim that auctions would increase the diversity of applicants is ludicrous. First, the Commission has proposed limiting participation in the auction to those already on file for the lottery. NPRM at ¶ 160. This would have the effect of limiting the pool of applicants to those already available to the selection process. Second, the use of lotteries will virtually exclude all but the "well heeled" from ever obtaining a license. Some applicants would not even be able to participate in the auction because while their business plan provided funding for application preparation, filing and construction, they would now find themselves unable to secure additional funding to acquire the license. Thus if anything, the diversity of the pool of potential licensees will shrink dramatically.

Therefore under a Retail Union balancing analysis, the Commission would be unable to justify retroactive application of its proposed auction rule. In light of Congress' apparent intent to **grandfather** applicants on file prior to July 26, 1993, the lack of any valid espoused public interest rationale for the Commission's proposal to apply its Rule retroactively, the detrimental reliance of affected parties on the current valid and established Rule, as well as the undue burden that such enforcement would impose on affected parties, such a retroactive application would be "arbitrary" and "capricious" and an abuse of the Commission's rulemaking authority.[14]

---

[13] 98 F.C.C.2d at 183.

[14] In the event that Commenting parties do not prevail on their argument, they wish to establish for the record, and in response to the NPRM at ¶ 160, they would favor limiting auction

Conclusion

Wherefore, for the reasons stated herein, the Commission should conclude that retroactive application of its proposed auction rule as to cellular applicants for unserved areas, who were on file prior to the cut-off date of July 26, 1993, would be contrary to the will of Congress and an arbitrary and capricious use of its rulemaking authority. Therefore the Commission should not adopt its proposal to use auctions retroactively for unserved-area cellular licensing.

Respectfully submitted,

ROBERT LUTZ, et al.

By: _____
John D. Pellegrin

_____
Evan D. Carb

Law Offices of
John D. Pellegrin, Chtd.
1140 Connecticut Avenue, N.W.
Suite 606
Washington, D.C. 20036
(202) 293-38381

Date: November 10, 1993

---

participation to those applicants already on file, and would favor the allowance of full market settlements prior to auction. As to this latter point, the Commission specifically authorized such being allowed when it established the filing criteria for these unserved areas. Any change of this policy at such a late date would further prejudice existing applicants who may have relied on this policy in reaching their decision to file. See First Report and Order, 6 FCC Rcd at 6221.

Exhibit 1

ROBERT LUTZ
SJMS, INC
PHILLIP SCHUMAN
JACKIE ALLEN
JULIE STONECIPHER
ARTHUR DALTON
LYNNEA BYLAND
JOHN PAROLINE